

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAY AMACK)	
Claimant)	
VS.)	
)	Docket Nos. 216,357 & 216,358
BONTRAGER EXPRESS SERVICE, INC.)	
Respondent)	
AND)	
)	
KANSAS TRUCKERS RISK MANAGEMENT)	
Insurance Carrier)	

ORDER

On April 1, 1998, the application of claimant for review by the Workers Compensation Appeals Board of the Award entered by Administrative Law Judge Bruce E. Moore on October 14, 1997, came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, James S. Oswalt of Hutchinson, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Joseph McMillan of Kansas City, Missouri. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board. The parties acknowledged that Docket No. 216,358 with accidental injury date beginning January 1, 1996, against Kansas Trucking Corporation, Inc. (K.T.C., Inc.) has been dismissed as to all issues and all parties.

ISSUES

Claimant raises the following issues to be considered by the Appeals Board.

- (1) Does K.S.A. 44-501(c) preclude claimant from receiving an award beyond claimant's entitlement to medical compensation necessary to cure and relieve claimant from the effects of his injuries?
- (2) The nature and extent of claimant's injury and/or disability.
- (3) Claimant's entitlement to current and future medical treatment.
- (4) All of the matters previously addressed before the Administrative Law Judge.

Respondent raises the following issues for consideration by the Appeals Board.

- (1) Whether claimant suffered accidental injury arising out of and in the course of his employment for the injury ending December 31, 1995, in Docket No. 216,357.
- (2) Whether claimant provided notice to the respondent of the accidental injury occurring through December 31, 1995. The parties acknowledged respondent's issue regarding timely written claim for the December 31, 1995, accident has been withdrawn and is not before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

Claimant began working for respondent K.T.C., Inc., as a truck driver in June, 1995. In September 1995, he transferred to Bontrager Express Service, Inc., and began working as a mechanic and supervisor. K.T.C., Inc., is a trucking company and Bontrager Express is a service facility primarily for repairing and maintaining over-the-road trucks. Both businesses are owned and operated by the same people at the same facility. Beginning January 1, 1996, claimant returned to K.T.C., Inc., and began working as a dispatcher. Claimant continued working in this capacity until he terminated his employment in June 1996. Claimant did return to Bontrager Express on several occasions between January and June 1996 to work as a mechanic on the Bontrager trucks.

In late October 1995, while working for Bontrager, claimant felt a popping sensation in his left shoulder while performing alignment work on a truck. Claimant continued to perform his work. He alleges he later approached Jeff Smiley, his supervisor, and advised

Mr. Smiley he needed chiropractic treatment, telling Mr. Smiley he had injured himself at work. Mr. Smiley disputes that contention.

Claimant first treated with Dr. Jolene Yoder, a chiropractor, on October 27, 1995. Dr. Yoder's initial records do not reflect any complaints to claimant's shoulder and give no indication that claimant suffered any accidental injury arising out of and in the course of his employment with respondent. Claimant treated with Dr. Yoder on several occasions through January 1996. By November 1995, claimant's complaints did include his left shoulder and upper thoracic spine. However, Dr. Yoder was never told claimant's medical condition was caused or aggravated by his work duties with respondent. Dr. Yoder noted that she has had several people referred to her by respondent but none for workers compensation injuries. Claimant paid for this chiropractic treatment.

On January 1, 1996, claimant assumed the role of dispatcher with K.T.C., Inc. His wife had previously held that position but she moved to the position of safety manager for K.T.C., Inc., and they worked together in that capacity until June 26, 1996. At that time claimant and his wife quit their employment with K.T.C., Inc., alleging record keeping discrepancies.

Claimant never missed any work as a result of any of his physical complaints.

Claimant's job at K.T.C., Inc., beginning January 1, 1996, paid a slightly higher weekly wage than the Bontrager job.

The Administrative Law Judge denied claimant benefits beyond medical compensation necessary to cure and relieve claimant from the effects of his injuries citing K.S.A. 44-501(c) and Boucher v. Peerless Products, Inc., 21 Kan. 977, 911 P.2d 198 (1996). K.S.A. 44-501(c) precludes an award beyond medical compensation when a claimant has not been disabled for a period of at least one week from earning full wages at the employee's customary work.

Claimant testified that the job transfer from Bontrager to K.T.C., Inc., was due to the lighter work available at the K.T.C., Inc., job and the fact that he was having physical difficulties performing his job at Bontrager because of the work-related injuries.

A job transfer to a lighter job obligated by the physical injuries suffered on the job would, in most instances, allow a claimant to avoid the application of K.S.A. 44-501(c) as claimant would have been precluded from earning full wages at his customary work as a result of the injury.

In order to consider whether the application of Boucher and K.S.A. 44-501(c) is appropriate, the Appeals Board must consider whether claimant suffered accidental injury arising out of and in the course of his employment which caused claimant to transfer jobs and whether notice of these injuries was provided to respondent in a timely fashion.

Claimant alleged the injury occurred while performing alignment work underneath the semitrailer trucks in Bontrager's shop. Claimant described a popping sensation in his shoulder which caused immediate pain and severe headaches. He first treated with Dr. Yoder in October 1995 but Dr. Yoder's records do not reflect any complaints in claimant's shoulder until November 1995. In addition, Dr. Yoder's records are void of any mention that claimant suffered a popping sensation in his shoulder or that his ongoing complaints were related to his employment. Dr. Yoder does acknowledge, however, that the physical labor required in this job could have made his condition worse although she did not believe the worsening would be permanent. She believed claimant's job was a stressor physically and felt that he should consider doing other types of work in order to avoid the physical stress.

Respondent provided the testimony of Mr. Clarence Bontrager, the owner of Bontrager Express and K.T.C., Inc. He acknowledged claimant worked for Bontrager Express through December 1995 and quit that position in order to fill the dispatch position with K.T.C., Inc. He alleged claimant took that position because it was a vacancy, it was less physically demanding, and claimant was able to work alongside his wife. He does recall claimant had problems with his shoulder but was never advised that the shoulder problems were related to his employment with Bontrager. He was advised that claimant's condition had been ongoing for years. In addition, the entire bill for Dr. Yoder's treatment was submitted to claimant's health insurance.

Mr. Bontrager acknowledged claimant returned to Bontrager from K.T.C., Inc., on several occasions to help with the mechanical work and exhibited no physical difficulties performing that labor.

Mr. Jeff Smiley, sales manager for Bontrager, made the first appointment when claimant went to see Dr. Yoder. Mr. Smiley's wife worked in Dr. Yoder's office. He does not recall claimant ever mentioning any physical problems associated with his work.

Conclusions of Law

In proceedings under the Workers Compensation Act the burden of proof is on claimant to establish the claimant's right to an award of compensation by proving the various conditions upon which the claimant's right depends. This burden must be established by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 1995 Supp. 44-508(g).

In order for a claimant to collect workers compensation benefits, an injury must arise out of and in the course of his employment. K.S.A. 44-501(c).

The phrase "out of employment" points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises out of employment where there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the condition under

which the work is required to be performed and the resulting injury. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973). The phrase "in the course of employment" relates to the time, place, and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

In considering the evidence, the Appeals Board finds claimant has proven that he suffered accidental injury arising out of and in the course of his employment while working for Bontrager. The physical activity required when aligning semitrailer trucks would place substantial physical stress upon one's shoulders and upper back. Claimant's allegations that he suffered injury to his shoulder and upper back is further supported by the testimony of Dr. Yoder who felt the physical activities and demands of claimant's job could have caused aggravation to claimant's physical condition. In addition, the fact that claimant's condition appeared to substantially improve after claimant transferred to the dispatcher job provides additional support for claimant's contentions regarding accidental injury arising out of and in the course of his employment.

K.S.A. 44-520 obligates an employee to notify the employer within ten days after the date of accident regarding the time and place and particulars of the accident. Claimant contends he advised respondent's representatives of his accidental injury to his upper back and shoulders. However, respondent's owner, Mr. Bontrager, and respondent's sales manager, Mr. Smiley, both contradict claimant's allegations that he advised them of the work-related injury. In addition, Dr. Yoder's medical reports and testimony contradict claimant's contentions as claimant never advised her of a pop in his shoulder and never advised her that his work aggravated his shoulder and upper back. The Appeals Board finds claimant has failed to prove that he provided notice in a timely fashion as is required by K.S.A. 44-520. Claimant's job transfer on January 1, 1996, appears to have resulted from claimant finding a job which he felt was physically easier, paid better, and allowed him to work in close proximity with his wife.

Therefore, the Appeals Board finds that the Award of Administrative Law Judge Bruce E. Moore dated October 14, 1997, should be reversed as claimant failed to prove that he provided notice to respondent of an accidental injury within ten days as required by K.S.A. 44-520. In addition, claimant provided no evidence and did not argue that there was just cause for his failure to provide notice. Therefore, the Appeals Board finds all benefits from the alleged injuries suffered through December 31, 1995, should be denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore, dated October 14, 1997, should be, and is hereby, reversed and claimant is denied an award for the injuries alleged.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority's finding that claimant did not provide timely notice of his accidental injury. I would adopt the Administrative Law Judge's analysis of the evidence and issue. The judge found claimant notified Mr. Smiley of his complaints the same day as the "popping incident." Further, Mr. Bontrager was advised of the worsening shoulder complaints before claimant began the job as dispatcher.

The evidence is persuasive that claimant was going to terminate his job with respondent because he was physically unable to continue performing his mechanic's job. Because Bontrager wanted to retain him, claimant was offered the job as dispatcher.

Although claimant did not miss work from his mechanic's job, K.S.A. 44-501(c) does not preclude him from receiving permanent partial disability benefits because the injury forced him to discontinue that work. Therefore, claimant has been disabled "for a period of at least one week from earning full wages at the work at which the employee is employed."

When considering the entire record, claimant is entitled to receive permanent partial disability benefits.

BOARD MEMBER

c: James S. Oswalt, Hutchinson, KS
Joseph McMillan, Kansas City, MO
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director